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In the Supreme Court of the United States

October Term, 1964

No. 797

GILES W. STADLER and CLIFFORD V. STADLER, Executors of the Will of RALSTON J. STADLER, also known as R. J. STADLER, also known as, RALSTON JOHN STADLER, Deceased,

Appellants,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,

Appellee.

JURISDICTIONAL STATEMENT.

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Appellants,

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STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,

Appellee.

JURISDICTIONAL STATEMENT.

Giles W. Stadler and Clifford V. Stadler, Executors of the Will of Ralston J. Stadler, also known as R. J. Stadler, also known as Ralston John Stadler, deceased, appeal from a judgment of the District Court of Appeal of the State of California, Second Appellate District, Division Four, affirming a judgment of the Superior Court of the State of California for the County of Los Angeles which became final after Order Denying Hearing of the Supreme Court of the State of California.

Opinions Below.

The Opinion of the District Court of Appeal of the State of California, Second Appellate District, Division Four (hereafter called the "District Court of Appeal")

is reported in 227 Advance California Reports 336, 38 Cal. Rptr. 587 (1964). A true and correct copy of said Opinion is attached hereto as Appendix A hereof. The Order Denying Hearing of the Supreme Court of California is not a reported opinion. A true copy of said Order Denying Hearing is attached hereto as Appendix B hereof. The Findings of Fact and Conclusions of Law and Judgment of the Superior Court of the State of California for the County of Los Angeles appear at pages 31-35 of the Clerk's Transcript filed herewith as a part of the record on appeal.

Statement as to Jurisdiction.

The action is for the recovery of a tax assessed and collected by the State of California under California Motor Vehicle Transportation License Tax Law (Cal. Rev. & Tax. Code, §§ 9601-10505) based upon revenues derived by Plaintiff,[1] a common carrier by motor vehicle, from his participation with other common carriers in the transportation of property moving in interstate commerce over through routes and at through rates. One of the grounds upon which recovery of tax is sought is that the tax statute, as interpreted and applied, is repugnant to Article I, Section 8, Clause 3 of the Constitution of the United States.

The judgment of the District Court of Appeal became a final judgment on July 19, 1964, after denial of petition for rehearing by said court and an Order Denying Hearing by the Supreme Court of California. (Appendix B: California Rules of Court, Rules 24, 28, Rules on Appeal, 59 Cal. 2d 1, 57 Cal. 2d 3-4) Notice of

[1]The term "Plaintiff" is used herein to refer to the original Plaintiff and Appellant in this action who died May 6, 1964.

Appeal to the Supreme Court of the United States was filed with the District Court of Appeal on October 7, 1964. On November 5, 1964, the Presiding Judge of the District Court of Appeal made and entered an order enlarging the time for docketing this case with this Court, to and including January 5, 1965.

Jurisdiction of this Court is invoked under 28 U. S. C. 1257(2). Cases believed to sustain such jurisdiction include:

Central Greyhound Lines, Inc. v. Mealey, 334 U. S. 653, 92 L. Ed. 1633, 68 S. Ct. 1260 (1948);

Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U. S. 157, 159-160, 98 L. Ed. 583, 588, 74 S. Ct. 396 (1953).

The state statute, the validity of which is here involved, is California Revenue & Taxation Code, Division 2, Part 4 (§§ 9601-10505) therein designated as the "Motor Vehicle Transportation License Tax Law" and herein sometimes referred to as the "Transportation Tax Law." The portions of said statute here most specifically involved, as they read during the Tax Period, are set forth below.

§ 9603 "'Operator' includes: (a) Any person engaging in the transportation of persons or property for hire or compensation by or upon any motor vehicle upon any public highway in this State, either directly or indirectly."

§ 9651 "A license tax is hereby imposed upon operators at the rate of 3 percent of the gross receipts of operators from operations."

§ 9606. " 'Gross receipts' include all receipts from transportation operations entirely within this State and a proportion, based upon the proportion of the mileage within this State to the entire mileage over which such operations extend, of the receipts from operations passing through, into, or out of this State, or partly within and partly without this State. . . ."

The full text of each of said sections, portions of which are quoted above, as said sections read during the Tax Period, is set forth in Appendix C hereof.

Questions Presented.

The basic question presented is whether the California Motor Vehicle Transportation License Tax Law, a "gross receipts" tax levied to compensate said State for use of its highways by for-hire carriers, as it has been interpreted and applied for the purpose of computing the taxable portion of the total revenue derived from the transportation of shipments in course of continuous movement in interstate commerce between points within and without California under through bills of lading and at applicable joint through interstate rates, is repugnant to the Constitution of the United States, Article I, Section 8, Clause 3. Subsidiary questions necessarily comprised therein are:

A. Whether, considering the through character of the commerce from which the revenues are derived and the purpose of the tax to compensate for highway use, allocation of the through revenue solely on the basis of mileage as authorized in *Central Greyhound Lines, Inc. v. Mealey,* 334 U. S. 653, *supra,* is the only method for division which will result in a constitutionally fair apportionment between or among states.

B. Whether, assuming *arguendo* there may be some method of allocation other than mileage, the agreed division of the through revenue among the participating carriers used by California as the basis of allocation is a constitutionally proper method for the allocation of such revenues between or among states for purpose of computation of the tax here involved.

C. Whether, the obligations under the interstate contract of carriage and the rates prescribed for computation of charges being joint, some portion of each aspect of the transportation performed in compliance with such contract and for such charge must be considered as attributable to each state affected by the through movement in arriving at a constitutionally fair apportionment of the through revenues among the several states for purposes of state taxation for highway use.

Statement of the Case.

The action is one for the recovery of taxes collected by California under the Transportation Tax Law predicated upon revenues derived by Plaintiff from his participation in interstate transportation of shipments moving during the period from October 1, 1954, through June 30, 1957.[2] The parties have stipulated as to the facts.

At all times during the Tax Period, the Plaintiff was a common carrier of property by motor vehicle in interstate commerce operating under certificates of public convenience and necessity as authorized by the Interstate Commerce Act, Laws of the United States. [Clk.

[2]Said period will be referred to herein as the "Tax Period."

Tr. pp. 49-50.][3] In the course of such interstate common carrier business, the Plaintiff participated with other common carriers by motor vehicle (hereafter called the "Connecting Carriers") in the transportation of shipments moving between points within California and points outside of California under through bill of lading contracts and at through rates. [Clk. Tr. pp. 32-33, 49-50.] As to all transportation so performed, Plaintiff was either the originating or delivering carrier and his vehicles operated at all times within the limits of California.

Shipments moving outbound were picked up by Plaintiff at the California origin and transported on his vehicles over public highways within California to the terminal of Connecting Carriers. [Clk. Tr. pp. 32, 49.] These Connecting Carriers then transported such shipments on their vehicles over public highways within and outside of California to destination or to a point of interchange outside of California with another Connecting Carrier. [Clk. Tr. pp. 32, 49.] Shipments moving inbound to California destinations served by Plaintiff were received by him at his terminal within California from a Connecting Carrier who had previously transported such shipments over public highways within and outside of California. [Clk. Tr. pp. 32-33, 49-50.] Plaintiff delivered said shipments on his vehicles operating over public highways within California. [Clk. Tr. pp. 32-33, 49-50.]

All outbound shipments moved the entire distance from origin to ultimate destination under a bill of lading issued by Plaintiff designating as point of origin the

[3]Reference is to page of the Clerk's Transcript.

point in California at which said shipment was received by Plaintiff and as destination the address of the ultimate consignee at a point outside of California. [Clk. Tr. pp. 32-49]. Shipments moving inbound to California destinations were transported the entire distance on bill of lading issued by the Connecting Carrier originating any such shipment. [Clk. Tr. pp. 33, 49.] Said bills of lading designated as the point of origin the address of the original consignor outside of California and as the destination the address of the ultimate consignee at a point within California on Plaintiff's line. [Clk. Tr. p. 49.]

The freight charge for each interstate shipment above described was the single origin-to-destination charge applicable under joint through rates published jointly by Plaintiff and the Connecting Carriers and filed with the Interstate Commerce Commission. [Clk. Tr. pp. 32, 50.] In each instance, the entire through charge was collected by one of the participating carriers. [Clk. Tr. p. 50.] In some instances, Plaintiff collected the through charge from the party responsible for payment. [Clk. Tr. p. 50.] In most instances, however, the through charge was collected by a Connecting Carrier. [Clk. Tr. p. 50.] In each instance, the carrier collecting the through charge retained a portion and remitted the balance to the other participating carrier (or carriers). The apportionment between, or among, the participating carriers was made in conformity with "Division Agreements" to which such participating carriers were parties. The apportionment was on a stated percentage basis. [Clk. Tr. p. 50.] However, such divisions were not proportional to mileage traveled by each carrier. [Clk. Tr. pp. 32, 50.]

The revenues which Plaintiff received (or retained) as his portion of the through freight charges under the Division Agreements was greater than the sums which he would have received had the through revenue been apportioned between, or among, the participating carriers on the basis of the miles which each transported such shipment to the total miles. [Clk. Tr. pp. 50, 51.] Plaintiff's proportion of the total revenue was greater than that which a mileage proration would produce because Plaintiff was in each instance either the originating or delivering carrier engaged in a short line operation and as a result of such circumstances, incurred certain costs for handling, documentation and administrative overhead related to each shipment which was not influenced by the distance of transportation and also because, as a result of traffic congestion and other circumstances, certain of the direct costs of transportation were greater on a mileage basis for the short-line than for the long-line transportation. [Clk. Tr. pp. 50, 51.]

The present case is the first one in which the appellate courts of California have interpreted and applied Section 9606 of the Transportation Tax Law defining taxable "gross receipts" in relation to revenue derived from interstate transportation. As Appellants understand the decision of the District Court of Appeal, the holding is that each participant in throught interstate transportation is to be treated as acting independently for purposes of computation of taxable "gross receipts"; that the only revenue to be prorated under the mileage formula set forth in Section 9606 is that part of the total revenue which each participant receives as his agreed portion of the through charge and that the only miles to be

considered are the miles traveled by the particular participant in the performance of his portion of the through service. Applying the foregoing interpretation, the District Court of Appeal held that all of the revenue received by Plaintiff from his participation in the transportation of through interstate shipments constituted taxable "gross receipts" under Section 9606 because Plaintiff's vehicles operated entirely within California while engaged in such transportation.

At all stages in the action (and in the antecedent claim for refund), Plaintiff urged that the taxing statute, as interpreted by the California courts, is repugnant to the Commerce Clause of the federal Constitution because such interpretation establishes an unfair method of apportionment of the receipts from interstate shipments among the several states through which such shipments pass and results in an undue burden upon interstate commerce. Briefly, Plaintiff's position has been that because of the through character of the commerce involved, the only method of apportionment of revenues derived therefrom among the states involved for purposes of local taxation for highway use which is constitutionally acceptable under the Commerce Clause is an apportionment which assigns to each state for its taxation the same portion of the total through charge as the miles which the commerce moves within the state bears to the total miles involved in the through movement.

The issue of constitutionality under the Commerce Clause was first raised in the claim for refund and was the subject of an expressly stated conclusion of law of the trial court predicated upon antecedent pleadings raising a claim of unconstitutionality as one of the grounds for recovery of the tax. [Clk. Tr. pp. 17, 34,

44.] Unconstitutionality of the statute under the Commerce Clause was an expressly stated ground of appeal urged before the District Court of Appeal and on the Petition for Rehearing. (Appellant's Op. Br. pp. 5, 23-26; Pet. for Rehear. pp. 12-19.) The question was passed upon directly by the District Court of Appeal in its opinion. (Appendix A, p. 4.) The unconstitutionality of the statute under the interpretation placed upon it by the District Court of Appeal was one of the primary contentions made in the Petition for Hearing in the California Supreme Court. (Pet. for Hear. pp. 16-20.)

Statement of the Grounds for Consideration of the Appeal on the Merits.

A. Statement of the Nature of the Tax Involved and of the Position Asserted by the California Courts in Support of Its Constitutionality Under the Commerce Clause.

The Transportation Tax Law has been construed by the California Courts as a revenue measure designed to secure for the state a fair return for the use of its public highways in transporting persons or property for compensation. (Appendix A, p. 5; *In re Bush,* 6 Cal. 2d 43, 52, 56 P. 2d 511 (1936).) By its express terms the tax is a levy imposed only upon those engaged directly in commerce, including interstate commerce. (Cal. Rev. & Tax. Code § 9603.) There are other taxes imposed by California pertaining to performance of carrier functions in interstate commerce within California. These include an income tax (Cal. Rev. & Tax. Code, Div. 2, Part 10, §§ 17001-19452), "Use Fuel" tax (Cal. Rev. & Tax. Code, §§ 8601-9355), and a "Vehicle License

Fee" tax (Cal. Rev. & Tax. Code §§ 10701-11005.6), among others. The last named tax, by its express terms, is a tax in lieu of ad valorem taxes. (Rev. & Tax. Code § 10758.)

The District Court of Appeal acknowledges the through interstate character of the commerce and concedes that in order for the tax to be valid under the Commerce Clause, there must be an allocation of the through revenue among the several states involved by some fair method of apportionment. (Appendix A, p. 4.) The District Court of Appeal recognizes that the mileage proration method of apportionment urged by Plaintiff has been held to be a fair method of apportionment by this Court in *Central Greyhound Lines v. Mealy*, 334 U. S. 653, 92 L. ed. 1633, 68 S. Ct. 1260 (1948), but concludes that such method of apportionment is not the method provided for in the Transportation Tax Law.

The District Court of Appeal decides that the constitutionally required apportionment of the through revenue is accomplished by first dividing the through revenue for purposes of apportionment between or among the states upon the basis of the division of such revenue agreed upon among the carriers for their private business purposes, and thereafter relating the portion of the total revenue so divided to miles transported within and without each state on a carrier-by-carrier basis.

The California court tacitly concedes there is no precedent in the decisions of this Court to support the validity of the statute as it has been interpreted. In justification of the fairness of the method of apportionment of the through revenue resulting from the statu-

tory interpretation adopted, the District Court of Appeal urges:

(a) That the apportionment of revenues need not be on a mileage basis and that it is reasonable to assume the divisions of the through revenue agreed upon voluntarily by the parties will also result in a fair apportionment among states for purposes of taxation (Appendix A, p. 4), and,

(b) That, in any event, amounts received by participating carriers under their division agreements in excess of that which they would receive if the division were made on a mileage basis represent ". . . preferential 'receipts' related to extraordinary services unrelated to physical haul or mileage and such extra 'receipts' must be regarded as payment for special services not related to the 'proratable' haul." (Appendix A, p. 7.)

B. The Appeal Should Be Considered by This Court on Its Merits Because the Decision of the California Court Necessarily Poses Constitutional Questions Which Have Not Been, but Should Be, Passed Upon by This Court.

The interpretation placed upon the Transportation Tax Law by the California courts as applied to the specific fact situation here involved poses a number of questions bearing on constitutionality under the Commerce Clause which, so far as counsel for Appellants have been able to discover, have never been decided by this Court.

Numerous decisions of this Court have been found dealing with the constitutionality of state taxes predicated upon revenues in which one or more of the

significant fact elements existing in the instance case have been involved. Appellants urge that these decisions, when considered together, compel a determination that the statute as interpreted is repugnant to the Commerce Clause. This is, however, apparently the first case in which a state has claimed the right to impose a "gross receipts" tax for highway use upon carriers engaged in through interstate transportation under which there is an apportionment of the through revenue for purposes of computation of tax other than on the basis of mileage. So far as Appellants have been able to detmine, the present case also presents the first instance in which a state has ever attempted to use carrier division agreements admittedly not related to mileage as the basis for statutory allocation of revenue between states to fix tax responsibility for highway use. Since the method of apportionment of revenue between states which results from the State Court's interpretation of its statute is one which the State Court has virtually admitted to be without precedent, it is appropriate and necessary that the appeal be considered upon its merits.

C. The Decision of the California Court Is Erroneous Because, in the Situation Here Presented, Proration of the Through Revenues Solely on the Basis of Mileage Is the Only Method by Which an Undue Burden on Interstate Commerce Can Be Avoided.

The California court acknowledges the statute violates the Commerce Clause unless provision is made therein for allocation of through revenue among the states involved by a fair method of apportionment. (Appendix A, p. 4.) This Court has held in *Central Greyhound Lines, Inc. v. Mealey*, 334 U. S. 653, 663, *supra* that

apportionment of revenue in relation to mileage (hereafter referred to as "Mileage Proration") is a proper method of allocation of revenues of carriers derived from through service in interstate commerce for purposes of computation of state tax imposed upon such commerce. The California court concedes that under its interpretation of the statute, the through revenues here involved are not apportioned among the states on a Mileage Proration basis. The tax is held constitutional, notwithstanding, on the premise such Mileage Proration is not required. (Appendix A, p. 4)

Interstate commerce cannot be subject to the burden of "multiple taxation." (*Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U. S. 157, 170, *supra.*) The through character of the commerce creates an equal right of taxation in every state through which such commerce moves and gives rise to the danger of cumulative taxation upon such commerce. (*Central Greyhound Lines, Inc. v. Mealey, supra.*)

The California Court has so interpreted the statute involved that the functions of interstate transportation are divided into what the California court characterizes as respectively "special services" (*i.e.*, such functions as invoicing, documentation and collection of charges) and "physical haul." (Appendix A, p. 8.) Under the State Court's interpretation only the latter is to be treated as "proratable" for purposes of allocation of revenues among the states involved.

Mileage Proration is necessarily premised upon the concept that interstate commerce is an indivisible entity and that some portion of both the benefits and liabilities of each function involved in accomplishing the through

transportation is attributable to each state through which the commerce moves. Therefore, any state which imposes a "gross receipts" tax for use of its highways under which revenue allocation is accomplished by Mileage Proration necessarily imposes tax upon some portion of the through revenues attributable to those aspects of the through service the California court has characterized "special services."

As noted, allocation of revenues among states on the Mileage Proration basis has been expressly approved by this Court. It must be presumed that states desiring to impose "gross receipts" taxes to compensate for use of their highways by carriers engaged in interstate commerce have, or will, provide therein for allocation of the through charges under the Mileage Proration formula. Since the tax allocation formula provided in the California statute (as interpreted by the courts) attributes to California greater portion of the through revenue for highway taxation purposes than results from the application of the Mileage Proration formula, "multiple taxation" on the same revenue dollar is a certainty.

The tax here involved is a tax levied directly upon the function of interstate transportation. Transportation, by definition, is movement. Unless all states, when they undertake to tax a segment of the movement use the same standard of measurement for purposes of revenue allocation duplication of the burden of taxation on the through interstate movement is inevitable. In the nature of things, distance (*i.e.*, miles) represents the only constant element usable as a standard for measurement of movement. Therefore, contrary to the holding of the California court, allocation of revenues on the basis of Mileage Proration is the only method of allocation which

will result in a fair apportionment guaranteed to prevent the undue burden upon interstate commerce which the Commerce Clause forbids.

D. Private Agreements Among Carriers for the Division of the Through Charges Derived From Interstate Transportation Are Not a Constitutionally Acceptable Method for Allocation of Revenues Derived From Interstate Commerce Among States for Purpose of Taxation.

The California Court views the tax here involved as one levied only against those portions of the total revenue which are received and retained by those participants in the through movement whose vehicles operate wholly or partially within California. The California court recognizes, and properly so, that by this interpretation an allocation of the through revenue among states within the purview of the Commerce Clause results. (Appendix A, p. 5.) Such apportionment is held to be constitutionally fair on the premise that it is to be presumed a fair allocation among states for tax purposes will result by accepting the divisions of the through charge voluntarily agreed upon by the participating carriers.

The basis of allocation adopted appears to be without precedent. The only case which Appellants have been able to find in which it appeared the gross receipts being taxed had been apportioned in relation to carrier agreements is *Lehigh Valley Railroad Co. v. Pennsylvania,* 145 U. S. 192, 36 L. ed. 672, 12 S. Ct. 806 (1892). However, as this Court noted in some detail in *Central Greyhound Lines, Inc. v. Mealey, supra,* 334 U. S. at 656-657, the agreements involved in *Lehigh Valley* provided for apportionment on the Mileage Proration basis. The apportionment, therefore, met constitutional

requirements because the formula was itself valid and not because the division was presumed valid because the carriers had agreed to it.

In *Interstate Oil Pipe Line Co. v. Stone,* 337 U. S. 662, 93 L. ed. 1613, 69 S. Ct. 1264 (1949) and *Canton Railroad Company v. Rogan,* 340 U. S. 511, 95 L. ed. 448 (1951), taxes predicated upon a separately assessed charge for services antecedent or subsequent to a separate and independent physically interstate movement were held to be proper. However, so far as can be determined from the opinions, neither case involved an attempt to tax commerce performed under a through contract and at through rates. In *Stone,* it is expressly stated that through commerce was not being taxed. (*Interstate Oil Pipe Line Co. v. Stone,* 337 U. S. 662 at 663.)

There are numerous objections to the use of the agreements among carriers for the division of revenues as the basis for allocation of such revenues among states. The first is that there is no relationship of purpose between the two types of division. There is a necessity that an allocation between states be fair. Fairness in the division of revenues among carriers may be morally desirable but it is not constitutionally required. If a division of revenues is fair as between carriers, each participant receives compensation in relation to the benefits he has performed for the other participants in connection with the through transportation. A fair tax allocation is predicated upon the fairness of the relationship of what is paid in tax to the benefits which the taxing state confers as that aspect of the interstate commerce to which it bears a special relation — in this instance provision of highways.

The record in this case shows that the divisions of through revenues among the carriers have been predicated upon numerous factors related to the through transportation activity but not directly related to highway use. [Clk. Tr. pp. 50-51.] The purpose of the tax here involved is to compensate the state for the use of its highways. As this Court recently stated in *General Motors Corp. v. Washington*, 377 U. S. 436, 12 L. ed. 2d 430, 84 S. Ct. 1564 (1964).

> "A careful analysis of the cases in this field teaches that the validity of the tax rests upon whether the State is exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation."

Under the interpretation which the California court has placed upon the tax here under consideration, the state of origin or destination of the commerce will always receive an allocation portion of the through revenue which is disproportionate to its contribution of highways used in the course of the through transportation. The allocation of revenue is not, therefore, fairly related to the aspect of interstate commerce to which the tax "bears a special relation."

Another, and it would seem a conclusive, objection to the method of allocation of through revenues for tax purposes which results from the State Court's interpretation of the statute is that it vests in private parties the power to establish—and change—both the pattern and the amount of the tax burden which any state can impose upon interstate commerce for the use of its highways. Therefore, under the State Court's interpretation of the law, there is, in reality, no statutory provision for allocation of the entire through revenue

among states. Because the carriers, under their private agreements and for their private purposes, have the exclusive power to determine how much of the total revenue will be subject to taxation by California for the use of its highways it is impossible to determine whether the burden of such tax is, or will be, unreasonable.

The District Court of Appeal has found the tax for highway use here involved to be constitutionally valid under the Commerce Clause even though its effect is to tax most those who use its highways least on the premise that allocations of through revenue are to be considered constitutionally fair for tax purposes simply because they are predicated upon divisions of the through charge voluntarily entered into by the parties. The decision represents a departure from all established precedents as to constitutionally acceptable method of apportionment of revenues among states for purposes of taxation. Premises considered, it is both appropriate and necessary that the appeal from said decision be considered on its merits.

E. The Concept of the California Court That the Revenues Derived From Through Interstate Transportation Can Be Allocated Among States in the Basis of What It Characterizes as Proratable and Nonproratable Functions Is Constitutionally Untenable.

The California Court has concluded it may lawfully consider for tax purposes all of the revenues which Plaintiff received from his participation in interstate commerce moving on through bills of lading and at prescribed joint through rates between points within and points outside of California. The basis for such holding is that Plaintiff, as the initial or delivering carrier,

received a portion of his revenues for the performance of "special services not relatable to the "proratable' haul." (Appendix A, p. 7.) The California Court thereby indicates it has failed to recognize the important distinctions which this Court has drawn between a local activity related to interstate commerce and an activity which is an integral part of such interstate commerce. (*Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U. S. 157, 164, 98 L. ed. 583, 74 S. Ct. 396 (1954).) In those situations in which the activity from which the revenue is derived is local in character and not an integral part of the through interstate movement, it has been held that tax can be predicated upon the whole of such revenue without infringement upon interstate commerce. (See: *Interstate Oil Pipe Line Co. v. Stone,* 337 U. S. 662, 93 L. ed. 1613, 69 S. Ct. 1264 (1949).) On the other hand, if the activity is an integral part of the through interstate commerce, there is a multi-state aspect to each function of the through commerce even though a particular activity is physically accomplished within the confines of a single state. (*Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U. S. 157, 98 L. ed. 583, 74 S. Ct. 396 (1954), *Joseph v. Carter & Weekes Stevedoring Co.,* 330 U. S. 422, 91 L. ed. 993, 67 S. Ct. 815 (1947); *Galveston etc. R. Co. v. Texas,* 210 U. S. 217, 52 L. ed. 1031, 28 S. Ct. 638 (1908).) In the *Joseph* case, the activity was considered an integral part of the through commerce even though the service was not paid for as a part of the through charge.

The vice of the State Court's reasoning is that it has failed to appreciate that every function of service performed by any participant in the transportation of a

shipment moving under a through bill of lading subject to applicable joint through tariffs is performed by and for the benefit of all participants and has a direct relationship to physical movement of the shipment in each state through which the commerce passes. Thus, when Plaintiff executed a through bill of lading contract, he fixed for all participants the manner and pattern of the movement through all of the states involved and created rights and liabilities by and to states other than California in the relationship of those states with participating carriers who may have had no direct concern with the portion of the movement physically performed within California. For example, by execution of the through bill of lading, Plaintiff bound the delivering carrier to answer to the ultimate consignee for damage to shipments actually caused by an intervening carrier and imposed upon the state in which delivery service was accomplished the obligation to make its courts available to resolve such controversy. (Interstate Commerce Act, § 20(11), 49 U. S. C. § 20(11).) Similarly, when Plaintiff within California collected the total freight charge, he did so not only for his own account but also as the representative of all participating carriers each of whom had a statutory obligation for collection of the charge. (Interstate Commerce Act, §§ 217(h) 223, 49 U. S. C. §§ 217(b), 223.)

If California can unilaterally decide that any given function which is a part of the through transportation service is a "nonproratable" function a similar unilateral decision can be made as to that or any other service function by any other state through which the commerce passes. There is, therefore, no protection under the method of allocation which California here adopts

against the establishment of duplicating taxation under the commerce involved. The method of allocation of through revenues which results from the State Court's interpretation of the statute has the effect of dividing what is in reality a single joint interstate transportation enterprise into a series of transportation operations treated as unrelated for the purpose of taxation. In legal contemplation, what the State Court has done, is to levy an unapportioned tax upon the revenues which Plaintiff has derived from his participation in a through interstate movement. As has been noted in the cases above cited, revenues which are derived by a carrier from activities which are an integral part of through interstate commerce must be apportioned for the tax to be valid even though the physical activities of the taxpayer are carried on entirely within the confines of a single state.

The decision of the State Court is in conflict with the decisions of this Court dealing with the right of the state to tax activities which are an integral part of interstate commerce. A review of the decision on the merits is, therefore, required.

F. Conclusion.

The question of the constitutionally proper method, or methods, for the allocation among states of the revenues derived from the through movement of interstate commerce by two or more carriers acting jointly for the purpose of computation of tax for highway use is one, which, so far as the Appellants can determine,

has not heretofore been directly presented to this Court. The constitutional issues necessarily involved on this appeal have important consequences upon interstate transportation by motor vehicle. The United States Supreme Court has jurisdiction. Appellants respectfully request that this Court assert such jurisdiction and that the appeal be considered upon its merits.

Respectfully submitted,

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R. Y. SCHUREMAN,
By THEODORE W. RUSSELL,
Attorneys for Appellants.

APPENDIX A.

Opinion of the District Court of Appeal of the State of California.

Reported in 227 Advance California Reports 336
38 Cal. Rptr. 587 (1964).

In the District Court of Appeal of the State of California, Second Appellate District, Division Four.

R. J. Stadler, Plaintiff and Appellant, vs. State Board of Equalization of the State of California, Defendant and Respondent. Civ. No. 27631.

Appeal from judgment of the Superior Court of Los Angeles County. A. Curtis Smith, Judge. Affirmed.

Action to recover motor vehicle transportation license tax paid under protest. Judgment for defendant affirmed.

Russell & Schureman and Theodore W. Russell for Plaintiff and Appellant.

Stanley Mosk, Attorney General, Dan Kaufmann, Assistant Attorney General, and Neal J. Gobar, Deputy Attorney General, for Defendant and Respondent.

Plaintiff appeals from a judgment of the trial court that he had not overpaid his motor vehicle transportation license tax ("transportation tax") and denying him recovery of such taxes paid under protest. Plaintiff is a participating carrier involved in the interstate shipment of goods. Each shipment here involved was shipped origin-to-destination as a single through shipment under a single bill of lading, but was physically handled as a "joint through movement" by two or more independent carriers acting under an "interline" arrangement. Under such an arrangement plaintiff and each participating

carrier was independently responsible for moving the goods over his portion of the journey and received a share of the through shipment charge. This share was fixed by a "Division Agreement" among the participating carriers.

Plaintiff's participation in the physical shipments was entirely within the State of California. Defendant, State Board of Equalization ("Board"), included all of plaintiff's receipts from such Division Agreements and assessed transportation tax based thereon. Plaintiff paid the tax, exhausted his administrative remedies, then instituted this action to recover what he maintains were taxes excessively and illegally upon him. The ultimate question presented on appeal is the proper interpretation of the statutory definition of "gross receipts" taxable under the transportation tax law. As applied to shipments moving in interstate commerce between points within California and points outside of California, the statutory provisions most directly involved are Revenue and Taxation Code sections 9606 and 9653, subdivision (b).[1]

Under the Division Agreements carriers originating or delivering shipments received a greater proportion of

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[1]Rev. & Tax. Code, §9606, provides, *inter alia*, as follows:

"'Gross receipts' include all receipts from transportation operations entirely within this State and a proportion, based upon the proportion of the mileage within this State to the entire mileage over which such operations extend, of the receipts from operations passing through, into, or out of this State, or partly within and partly without this State."

Section 9653, subd. (b), provides as follows:

"The tax does not apply to the gross receipts derived from the transportation of persons or property wholly within incorporated cities or between incorporated cities or incorporated cities and private property or wholly on private property where no portion of the public highway outside the corporate limits of the cities or private property is traversed in such operation."

the total freight charges than that which a mileage proration would produce because they incurred certain costs for handling, documentation and administrative overhead, and because of traffic congestion and other circumstances not influenced by the distance of transportation and not encountered by other carriers participating in the movement of the goods. As to all of these shipments plaintiff was either an originating or delivering carrier. Thus, the proportion of the total freight charges which he received was in each instance an amount greater than that which he would have received had the total freight charges been divided between the participating carriers on a straight mileage proration basis. The Board treated the full amount of such receipts by plaintiff as "gross receipts" taxable under the law and did not itself apply to such receipts any mileage proration. Had it applied a straight mileage proration the amount of plaintiff's taxable receipts would have been less and correspondingly its taxes would have been less.

On appeal plaintiff asserts that the interpretation placed upon section 9606 by the trial court is erroneous, being inconsistent with the legislative purpose of the section and contrary to the evidence. He maintains that the key word in the statutory language is "operations" and that in the context in which it appears the term can have reference either to physical activities incident to the movement of goods or to the commercial transactions which themselves constitute the commerce and are the direct source of the revenues being considered. Plaintiff contends the trial court adopted the "physical activities" interpretation.

As the Board views the law, and we believe, correctly, "transportation operations" refer to any and all activities which contribute to an origin-to-destination movement. (See *Bekins Van Lines, Inc. v. Johnson,* 21 Cal. 2d 135; *Pacific Greyhound Lines v. Johnson,* 54 Cal. App. 2d 297.) Under this interpretation, each long-line carrier reported and paid a tax on that portion of its receipts under the Division Agreement as its mileage in California bore to its total mileage. Thus, in operation the law did not impose any undue burden upon interstate commerce, since it is recognized that receipts for interstate shipments must be allocated among the several states through which the particular shipment passes. Plaintiff was similarly taxed, his total tax including the tax that would be referable to mileage proration alone.

In *Central Greyhound Lines, Inc. v. Mealey,* 334 U. S. 653, the court held that one proper method of allocation of taxes based on the revenues from such shipments is according to mileage within and without the taxing state. The Supreme Court did not state that this method is the *only* proper method. The test is stated generally, "The tax may be 'fairly apportioned' to the business done within the state by a fair method of apportionment." (*Western Livestock v. Bureau of Revenue,* 303 U. S. 250, 255.) Since all of plaintiff's mileage was in California the Board included as taxable "gross receipts" all amounts allocated to plaintiff under the Division Agreement. Under this plan any carrier who participated in interstate shipment entirely outside of California, and therefore had no California mileage, paid no California tax.

The tax is a revenue measure designed to secure for the state a fair return for the use of its public highways

in transporting persons or property for compensation (*In re Bush*, 6 Cal. 2d 43), and the rate applied is 3 per cent of the gross receipts of the operators from their operations. Plaintiff's main complaint as to the Board's interpretation and application of the law is that it was improper under section 9606 to allocate to California all plaintiff's receipts for his services rendered in California because not apportioned on a mileage basis, and that if such allocation is proper under the statute, the law is unconstitutional as applied to plaintiff.

The Board has established the policy of looking to each participating carrier to account for his own gross receipts apportioned according to his own mileage in California and his total mileage. Plaintiff asserts that his tax should be measured on that portion of the total shipment price which his California mileage bears to the total shipment mileage, and without regard to the amount he actually received.

Under the Board's method, the Board taxes such proportion of the operator's gross receipts as his mileage in California bears to his total mileage. Thus, each operator upon completion of partitipating in a shipment will know what his own receipts are and what distances are traveled by his own vehicle within and without California, and the operator's necessary tax information is both available to him in his own books and records and to the Board for auditing purposes. Under plaintiff's proposed allocation, it is conceivable that it could cause some long-line carriers to pay a tax measured by allocated amounts in excess of their actual gross receipts. The Board's method of allocation is based upon the operators' own Division Agreements. It is not unreasonable for the Board to follow the apportionment estab-

lished by the operators themselves. Thus, the transportation tax is actually measured by receipts. Mileage is relevant only to allocate receipts among the states traversed.

The method approved by the trial court in the within case has been used as a long-standing practice by the Board and also by other operators interlining with plaintiff. Administrative interpretations of controlling statutes by public officers upon whom the duty of administering is imposed are entitled to great weight and will not be overturned unless clearly erroneous. (*Riley v. Thompson,* 193 Cal. 773, 778.)

Plaintiff points out that under the Board's approach, different carriage arrangements may result in different tax consequences. Therefore, he asserts that the Board's interpretation of section 9606 does not operate uniformly as required by article I, section 11, of the California Constitution. The latter section, however, only requires that a tax be applied to all members of a class in the same manner. The uniformity required is uniformity in operation, not uniformity in result. (*Wholesale T. Dealers v. National etc. Co.,* 11 Cal. 2d 634, 661.) Here, the Board's interpretation applies to all members of a class in the same manner. All originating and terminating carriers, which perform services in addition to hauling, are taxed the same; all non-originating or interim carriers are likewise treated the same. There is no discrimination in application between those performing the same services.

The problem presented by the instant case is caused by the plaintiff who seeks an advantage not related to the equities. It is admitted that with respect to that portion

of the gross receipts allocated to mileage, all carriers, including originating, interim and terminal, are taxed uniformly. There is no proration of that portion of the gross receipts attributable to the special services performed by the originating and terminal carriers among the interim carriers for the reason that the latter do not perform any part of such special services. Plaintiff has caused this condition by his participation in the interline agreement. This agreement, interstate in scope, may be regarded as establishing and defining, as between the respective carriers, intrastate as well as interstate rights and obligations. With respect to intrastate business exclusively, no problem is presented,—all receipts may be properly taxed. With respect to interstate business, in order to conform to the rule of uniformity of levy to avoid the charge of undue burden on interstate commerce, wherever and whenever a terminal, initiating or interim carrier receives preferential "receipts" related to extraordinary services, unrelated to physical haul or mileage, such extra "receipts" must be regarded as payment for special services not related to the "prorata-ble" haul. The interline carriers, in this case, accord this extra or unproportional payment to the initiating or California carrier. Reciprocally, he accords them the correlative payment or extra "receipts" for similar special non-hauling services in their respective states. The tax on such "extra" gross receipts paid for special services does not result in ununiformity of levy on interstate commerce. All carriers are taxed uniformly on a mileage basis, including the California carrier, although the latter pays more tax totally because of such extra transportation services unrelated to mileage haul. Since the other carriers are accorded the reciprocal extra

payment for like services when they are the initiating, interim, or terminal carriers there is uniform taxation with respect to the totality of interstate commerce that may be involved.

Plaintiff asserts that approximately 40 per cent of the revenues which were used as the basis for the computation of the tax imposed against him had its source in transactions in which plaintiff's transportation of the property involved was wholly within the limits of incorporated cities and therefore exempt under the provisions of section 9653, subdivision (b). He further contends that such operations, being wholly within municipal limits, did not require plaintiff's use of public highways outside of such incorporated cities. Nevertheless, the shipments having been a part of shipments between points within and without California, and having been in interstate commerce, beyond such municipal limits, and on state highways beyond such limits, under the construction given the law by the Board, plaintiff's revenues therefrom were taxed. Both sections deal with the same subject matter, plaintiff asserts, namely, the definition of taxable "gross receipts." Both sections employ the term "operations" and plaintiff submits it is inconceivable that the Legislature intended such term to have diametrically opposite meanings in these two closely related sections. Yet such, plaintiff contends, is the result of the trial court's decision.

As heretofore noted, however, the Board's interpretation of "transportation operations" in section 9606 is that it refers to any and all "activities" which contribute to an origin-to-destination movement. Section 9653, subdivision (b), however, talks of the "transportation of property," that is, the shipment of an item of property.

The word "operation" is used in the singular. Thus, an "operation" could refer to a single complete shipment, and under such interpretation plaintiff's asserted inconsistency disappears.

In any event, the legislative history of the enactment of the transportation tax is helpful in construing the intent and purpose of the exemption accorded under section 9653, subdivision (b). This exemption was added at a time when state revenues were not used to maintain city streets. Thus, its obvious purpose was to exclude shipments which made no use whatever of state highways from bearing any of the cost of their upkeep. The courts have construed that when any portion of an operation is outside a city, however, the entire receipts are subject to tax. (*San Diego etc. Ry. Co. v. Bd. of Equalization,* 89 Cal. App. 2d 267.) The courts have also held that section 9653, subdivision (b), is an exemption statute which under the rules of construction applicable thereto should be strictly construed against the taxpayer. (*Santa Fe Transp. v. State Board of Equal.,* 51 Cal. 2d 531, 539; *Robertson v. Johnson,* 55 Cal. App. 2d 610, 614.) The Supreme Court has held that when a single shipment passes over a state highway, even for a short distance, all the carrier's receipts from the shipment are subject to the tax, even where the carrier separates his operations and equipment within the cities from his longhaul operations and equipment. (*Santa Fe Transp. v. State Board of Equal., supra.*) It is logical for the Board to hold that the same result should follow where several carriers join in performing the through movement: that when a carrier such as plaintiff participates in a shipping contract which provides for a single payment for a haul which travels on

state highways, as well as in cities, each participating carrier is obtaining benefit from the use of state highways regardless of where his own trucks move, and each participant should be required to support their upkeep. Section 9653, subdivision (b), extends the exemption only where the transportation of property is "wholly" within or between incorporated cities "where no portion of the public highway outside the corporate limits of the cities or private property is traversed in such operation." (See *Santa Fe Transp. v. State Board of Equal., supra.*) None of the shipments participated in by plaintiff here involved remained entirely within an incorporated city. Thus, they did not qualify for the exemption.

There was no error by the Board in its interpretation of the law or its application thereof in "fairly apportioning" the tax on plaintiff's operations. Plaintiff, therefore, is not entitled to any refund of taxes, and the judgment is affirmed.

Burke, *P. J.*

We concur:

Kingley, *J.*

Jefferson, *J.*

APPENDIX B.

Order Due
July 17, 1964

Order Denying Hearing After Judgment by District Court of Appeal, 2nd District, Division 4, Civ. No. 27631.

In the Supreme Court of the State of California In Bank.

Stadler v. State Board of Equalization.

Appellant's petition for hearing Denied.

Gibson
Chief Justice

APPENDIX C.

§ 9603. "Operator": Who included. "Operator" includes:

(a) Any person engaging in the transportation of persons or property for hire or compensation by or upon a motor vehicle upon any public highway in this State, either directly or indirectly.

(b) Any person who for compensation furnishes any motor vehicle for the transportation of persons or property under a lease or rental agreement when such persons operates the motor vehicle furnished or exercises any control of, or assumes any responsibility for the operation of the vehicle irrespective of whether the vehicle is driven by such person or the person to whom the vehicle is furnished, or engages either in whole or in part in, the transportation of persons or property in the motor vehicle furnished. "Operator" does not include any of the following:

(a) Any person transporting his own property in a motor vehicle owned or operated by him unless he makes a specific charge for the transportation. This subdivision does not in any way limit any other exemption granted by this section.

(b) Any farmer, resident of this State, who occasionally transports property for other farmers, or who transports his own farm products, or who transports laborers to and from farm work incidentally in his farming operations.

(c) Any nonprofit agricultural cooperative association, organized and acting within the scope of its powers under Chapter 4 of Division 6 of the Agricultural Code,

to the extent only that it is engaged in the transporting of its own property or the property of its members.

*(d) Any person whose sole transportation of persons or property for hire or compensation consists of the transportation of children to or from any public [or nonprofit private] school and whose total compensation from all sources for providing such transportation does not exceed fifty dollars ($50) [one hundred dollars ($100)] in any calendar month.

(e) Any person engaged in the business of operating a hearse or other vehicle in a procession to a burial ground or place of interment and from the burial ground or place of interment to a garage or place of storage.

(f) Any registered owner of a pleasure vehicle who, while operating the vehicle, transports person to his work or to a place through which he passes on the way to his work, whether for or without compensation, if he is not in the business of furnishing such transportation.

*(g) [Any person engaged in the business of collecting and disposing of garbage, rubbish or waste, and who transports any such matter in a motor vehicle owned or operated by him, unless he makes a separate or specific charge for transportation. It is hereby declared that any such business is one substantially effecting the public health and welfare.]

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*Words and phrases in brackets indicate additions and changes accomplished by amendments contained in Cal. Stats 1955, Chapter 1905, Section 1, p. 3517.

§9606. "Gross receipts" include all receipts from transportation operations entirely within this State and a proportion, based upon the proportion of the mileage within this State to the entire mileage over which such operations extend, of the receipts from operations passing through, into, or out of this State, or partly within and partly without this State. "Gross receipts" as applied in connection with operations under lease or rental agreement include such amounts as the board under such rules and regulations as it may prescribe determines to be reasonable compensation for the transportation services rendered by the operator.

"Gross receipts" do not include revenue derived by an express company from the shipment of property over the lines of common carriers, but do include revenue derived by an express company from the transportation of property in motor vehicles operated by it.

§ 9651. Imposition and rate of tax. A license tax is hereby imposed upon operators at the rate of .3 percent of the gross receipts of the operators from operations.